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IN THE

Supreme Court of the United States

October Term, 1967.

No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3RD, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

Respondent's Brief and Appendix in Opposition to the Petition for Certiorari and to the Motion to Consolidate With Lisi, et al., Docket No. 70.

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Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI AND TO THE MOTION TO CONSOLIDATE WITH LISI, et al., DOCKET NO. 70.

OPPOSITION TO MOTION AND SUMMARY OF ARGUMENT.

Respondent, Eastern Air Lines, Inc., opposes the motion to consolidate the present case with *Alitalia-Linee Aeree Italiane S. p. A. v. Lisi,* Appellate Docket No. 70 (370 F. 2d 508, 2d Cir. 1966),[1] which has been pending in this court. The parties are different; the questions presented to the respective courts below were different (*infra* pp. 11-

1. This case is hereafter called *Lisi.*

12; 14-15); the record facts are different (*infra* pp. 11-13); the holdings are different (*infra* pp. 11-12; 13-19).

Since the present petition for certiorari is an attempt to establish similarity between the two cases, consolidation would be justified only if the petition is a fair representation of the record below and established the similarity. It is not and does not.

Certiorari in the instant case should be denied because:

(1) This is not a Warsaw Convention ticket case. The ticket is not in evidence and no issue about it was ever tried during the eleven years this case has been pending (*infra* pp. 7-13).

(2) The Petition lacks candor. It does not state the case as required by Rule 23(e), and the forty-page argument, which develops "reasons for granting the writ", misinforms this court about the record below (*infra* pp. 7-13) the holding below (*infra* pp. 18-19) and the position petitioner took in the courts below (*infra* pp. 13-15).

(3) Apart from its holding that Articles 17 and 22 of the Warsaw Convention must be read "in pari materia" (Petition, p. 71), the Court of Appeals neither interpreted the Convention nor decided that under it a plaintiff must prove negligence. It held merely that, under the evidence, petitioner [2] would lose even on his own argument about the law (*infra* pp. 13-19).

This brief describes the very prolonged litigation and documents the truth of the foregoing propositions which, we submit, demonstrate that this case is not one for review. SUPREME COURT RULE 19. Other reasons for denying the petition are argued at the end of the brief (*infra* pp. 19-21). The arguments are short enough to constitute their own summary.

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2. In this brief the words plaintiff, appellant, petitioner, include the plural and often refer to counsel.

OPINIONS BELOW.

Petitioner did not append the opinion of the trial judge [Rule 23(i)], even though fifteen pages of the argument criticizes his findings of fact. His opinion is Appendix A to this brief.

THE CONVENTION INVOLVED.

Pertinent provisions of the Warsaw Convention not printed by petitioner [Rule 23(d)] are Appendix B to this brief.

STATEMENT OF QUESTIONS PRESENTED.

Should certiorari be granted to review a decision of a court of appeals where

1. The facts upon which the petition for certiorari is predicated are nowhere in the record;

2. The Court of Appeals held that, on the state of the appellate record and the evidence at trial, it was not necessary to decide the question which petitioner presents to this court;

3. The decision of the Court of Appeals conflicts neither directly nor indirectly with any other decision, since the court affirmed the judgment below upon the unique trial and appellate record before it and did not resolve any important question of substantive law;

4. The petition requests this court to re-evaluate evidence and to set aside findings of fact made by a district judge duly affirmed by a court of appeals; and

5. There are multiple grounds, undecided by the court below and not even mentioned in the petition, which would require affirmance of the judgment if the case were reviewed?

STATEMENT OF THE CASE.

"This was an action commenced in 1956 (1a) to recover for the death of Carlos Berguido, a Philadelphia lawyer specializing in international law, who was a passenger on an Eastern Air Lines international flight which crashed near Imeson Airport, Jacksonville, Florida, on December 21, 1955.

The complaint, tacitly recognizing that the flight was subject to the Warsaw Convention, alleged, in the words of the Convention, that Eastern was guilty of "wilful misconduct or . . . default . . . equivalent to wilful misconduct" (Article 25(1) of the Convention, Petition, p. 7; Complaint, 18a). No other ground for recovery was stated.

Trials were started twice in May, 1961 (6a) but both resulted in mistrials, the first because the trial judge thought one of plaintiff's witnesses was trying unfairly to prejudice the jury against defendant, and the other because plaintiff's lawyer said he was sick.

Commencing in October, 1961, the case was tried and plaintiff obtained a verdict based on inadmissible evidence, hearsay conclusions made to the Civil Aeronautics Board. The Court of Appeals reversed (317 F. 2d 628) and this court denied plaintiff's petition for a writ of certiorari (375 U. S. 895). Later it became apparent that the "expert" testimony supporting plaintiff's verdict came from men who lacked disinterest, objectivity, reliability and expertise and who expressed incredible, unqualified, highly speculative and conjectural opinions.[3]

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3. These were the observations of visiting Judge George H. Boldt, who presided at the last trial and heard plaintiff's three "experts" for hours of detailed testimony. Judge Boldt is a man of immense talent, highly perceptive, courteous but firm with counsel, fair, knowledgeable and hard working. He knows the law. He understands witnesses and the differences between substantial and equivocal evidence. He is the epitome of the good trial judge. The entire record of the trial

The re-trial took three weeks, and defendant exercised the "opportunity to cross-examine" (317 F. 2d at 632) which it was denied before. That examination demonstrated that the hearsay conclusions introduced earlier were highly speculative. The opinion testimony of plaintiff's witnesses was not accepted. The jury found that there was no wilful misconduct.

Accordingly judgment was entered for plaintiff in the amount of $8,300, the sum prescribed by the Warsaw Convention.

Chief Judge Clary, reversing the exercise of his own discretion during the trial and relying upon "errors" which were not preserved for review prior to the verdict, granted plaintiff a new trial.

Defendant petitioned for a writ of mandamus and prohibition arguing that the Chief Judge had exceeded his power. Under Amendment 7 of the United States Constitution no fact tried by a jury can be "reexamined" as the District Court did. The Court of Appeals, without an opinion, denied the petition. A petition for reargument was also denied with Chief Judge Biggs dissenting. Apparently the court never reached the merits of defendant's attempt to get review of Judge Clary's action.

Thereafter the case was assigned to the Honorable George H. Boldt visiting in the Eastern District of Pennsylvania from the District of the State of Washington. The parties agreed to try the action non-jury. They waived entry of findings of fact and conclusions of law and agreed that Judge Boldt's decision might be limited to a general finding, either for or against liability and in a single total sum fixing damages (A23—referring to Appendix A to this brief), just as a jury would do in a verdict. They agreed that such a finding would be deemed the same as a jury

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before him, from his careful narrowing of the issues at a pre-trial conference through his most articulate opinion (Appendix A to this brief), is a credit to our judicial system and bears out fully these statements about him.

verdict, and that all rules applicable to a verdict would be applicable to such a finding (112a-113a).

At a pre-trial conference, with the complete agreement of plaintiff's counsel, the legal issues were narrowed to the questions, did the Warsaw Convention apply and was there wilful misconduct within its scope?

Judge Boldt heard testimony, considered myriad exhibits, and read many depositions through eight full days of trial. He heard argument from counsel for a full day. He made a mixed finding of fact and law that the Warsaw Convention applied to the flight in question (A25). He found that plaintiff did not sustain the burden under that Convention of establishing defendant's wilful misconduct (A27; A28-9). Accordingly judgment was entered for plaintiff for the $8,300 prescribed by the Convention.

Judge Boldt undertook to make all findings necessary to dispose of the case, even if it were decided on appeal that the Warsaw Convention did not govern. He found that defendant was not negligent (A27).

Plaintiff appealed, claiming for the first time during all the years the case had been pre-tried, tried and re-tried, that Berguido's ticket did not comply with Article 3 of the Convention. Since the pre-trial procedures precluded raising theories not presented to the trial court, plaintiff's counsel argued that *if the ticket violated Article 3, the Convention did not apply* and all he had to prove was negligence (*infra* pp. 13-17). The court affirmed the judgment below, holding that Judge Boldt's finding that plaintiff failed to prove negligence disposed of plaintiff's contention. There was therefore no need for the court to consider the "ticket" issue or other points which defendant argued would have required affirming the judgment.

On petition for rehearing plaintiff tried to make out a conflict between the decision and the Second Circuit's holding in *Lisi*. Seven judges (Biggs, McLaughlin, Hastie, Forman, Smith, Freedman and Seitz) decided against a rehearing; two (Kalodner and Staley) wanted one.

ARGUMENT.

1. Certiorari Should Not Be Granted to Review Legal Questions Based on "Facts" Not in the Record.

Petitioners say that Carlos Berguido's ticket was "identical" to, or "less legible and less informative" (to whom, Berguido?) than John Lisi's[4] ticket (Petition, pp. 12, 14). On that contention *about the facts* hang four of the five questions petitioners present (Petition, p. 3), their prolix and unnecessary legal argument (Petition, pp. 9-34),[5] their motion to consolidate this case with the *Lisi* case, and their prayer for relief (Petition, p. 25).

The statements made by petitioner's counsel are not facts of record. They are imaginary. They came into this case for the first time at the appellate level after some ten years of litigation. They developed not from evidence, or from findings by a trial judge or a jury, not as an inference from a verdict or as a ruling by a court, but as unsupported statements in letters and briefs petitioner's counsel wrote to the judges of the Court of Appeals. The majority of the judges decided the case without having to study the record to see whether it supported the statements about the ticket (*infra* pp. 18-19), and the dissenting judge also did not "reach this contention" (Petition, p. 84). On petition for rehearing Judge Kalodner again dissented. This time he said that the Lisi ticket was "similar to that here involved" (Petition, p. 58). He must have accepted as true what plaintiff's counsel said about the Berguido ticket. He must have done so without examination of the record, for

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4. This is a reference to *Lisi, et al. v. Alitalia Aeree Italiane S. p. A.*, 370 F. 2d 508 (1966), *cert.* 2d Cir., Appellate Docket No. 70.

5. We assume that *Lisi* has been well briefed and that rehashing it is unnecessary. We take no position one way or the other about that case. The present case is not and never has been *Lisi*.

he could not have found either in the pleadings, or in the pre-trial memoranda, or in the many pre-trial conferences and rulings, or in the evidence introduced at three complete trials, a fair basis for the conclusion. Yet belief in its truth led him and Judge Staley to dissent from the decision of the other seven judges and to say that the majority's decision conflicted with the Second Circuit's *Lisi* decision (Petition, pp. 58-60). Therein lies a grave soft spot in our system of justice. Two judges decided against appellee because of their belief in the truth of mis-statements made by the appellant's lawyers.[6]

What does *the record* show about Berguido's ticket? First and foremost, the entire ticket is not in evidence. Copies of parts of it are (Petition, Appendix B), but the entire ticket (the jacket, the back, the terms and conditions, whatever there might have been besides the flight coupons) was not introduced by anyone at any of the five trials, and does not appear in any of the pre-trial procedures (even

6. We are not arguing morals. A party can be hurt just as badly by inadvertence or over-zealous advocacy as he can be hurt by intentional deception. Suppose, for instance, that it were important to a justice of this Court, in considering the instant petition, to know what Judge Hastie thought about this case. Suppose that the justice accepted as true petitioner's mis-statement on page 2 of the petition that Judge Hastie dissented (he did not, he signed the opinion for himself and the other six judges denying the petition for rehearing). Respondent could be hurt. And it would not matter whether the statement "Hastie dissented" was an inadvertent slip (which it appears to be) or a planned deception (which it might have been). In either case Respondent would be hurt just as much.

Suppose it were important to a justice to know whether petitioner was attempting to get relief on a ground never raised at the trial level, or whether he was arguing a point inconsistent with his position in the Court of Appeals, and suppose that the justice read on page 9 of the petition:

> "The appellant's position has consistently been that she wins on proof of failure by the carrier to comply with Article 3(1) and that she need prove neither negligence nor wilful misconduct."

If the justice accepted that statement at face value, respondent would be hurt. The statement quoted above, and we cannot and do not equivocate here, is absolutely false (see pages 13-19, *infra*).

Judge Kalodner, the dissenter, agrees—Petition, p. 84, fn. 1). The ticket was paid for and obtained by Berguido on December 2, 1955, three days before his initial flight, and it provided round-trip air transportation from Philadelphia to San Salvador and return (Complaint, ¶ 3, 18a; for date of initial flight, December 5, 1955, see flight coupons, Appendix B to Petition).[7] Apart from what appears in the Complaint and in the copies of the face of the flight coupons there is *no* evidence—either documentary or otherwise—describing the ticket, its size, its color, what was written on it, etc. There was, however, a pre-trial agreement in 1961 that

> "The tickets issued to plaintiff's decedent complied with the provision of Article 3 relating to documents."

This is a quotation from Defendant's Trial Memorandum (Record Document 85). Plaintiff's memorandum in reply (Record Document 84) agreed:

> "The plaintiff has very little opposition to defendant's statement of the case. The plaintiff disagrees with the legal result . . ." followed by the argument that the Warsaw Convention was inapplicable to Berguido's flight from Miami to Philadelphia (9b-12b).

Judge Boldt had this agreement before him at the pre-trial conference prior to the last trial (71a-72a). He specifically asked plaintiff's counsel about it and they represented to the judge without reservation that their position about the Convention was set forth in that memorandum (117a).

At no time during any of the trials, pre-trials, or post-trial procedures in the district court did plaintiff's counsel

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7. References followed by the letter *a*, i.e., 18a, are page references in Appellant's Appendix, Appeal No. 15156, Court of Appeals for the Third Circuit. References followed by *b*, are to Appellee's Appendix in the same appeal.

repudiate their agreement or suggest that there was an issue between the parties about delivery of the tickets to Berguido or his understanding of their import. Therefore, these matters were never actively litigated and necessarily there is no specific fact finding about them.[8]

Is it "scandalous" to represent to this court as "facts" matters which were never established in the trial court or which were resolved there contrary to what this court is told? If it is, then the petition should be "disregarded and stricken by the court" (Supreme Court Rule 40), for the petition contains many such "scandalous" statements. For instance:

> The defendant airline failed "to print in adequately informative, clear, proper legible form" certain information on Berguido's ticket—Question Presented No. 1 (Petition, p. 3).
>
> * * *
>
> ". . . the carrier has failed to comply with Chapter II, Article 3(1) of the Convention as to the form and contents of the ticket or proper delivery of the same". Question Presented No. 2 (Petition, p. 3).
>
> * * *
>
> ". . . the ticket in the instant case" had "miniscule illegible print" and failed to state a "monetary limitation". Jacksonville was an "agreed stopping place." Question Presented No. 3 (Petition, p. 3).

See also p. 14 where petitioners say plaintiff's decedent had *not* agreed to land in Jacksonville, also a statement with no evidence to support it.

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8. This is not to say that there was no finding at all. When parties agree about an issue it is "found" in the sense that it becomes a fact. No proof is necessary. In this sense tickets meeting all requirements of Article 3 were "found" as a part of each of the trials. And that fact was "found" no matter where the burden of proof would have been if the parties had disputed the fact.

* * *

> Petitioner "established a faulty ticket"—A black-letter heading on page 10!

It would be most interesting to know where in the record petitioners took the procedural step to "establish" this crucial fact. What fact-finder, judge or jury, made any such finding? It would, perhaps, have been helpful to the court if petitioners had included the record reference where the "evidence offered" may be found and where the finding about that evidence was made. See Rule 40, 1(e) and 2; Stern and Gressman, *Supreme Court Practice* (2nd Ed. 1954), p. 198.

* * *

> ". . . the carrier delivered a . . . ticket much less legible and less informative than the *Lisi* ticket." (Petition, p. 12)

* * *

> ". . . the form, context, size of print and the obscurity and difficulty in reading the *Lisi* and the instant Berguido ticket are identical" with one exception (Petition, p. 14).

* * *

And so it goes, factual statement after factual statement, all of them unsupported by the record and most of them directly contrary to counsel's pre-trial agreement.

In *Lisi* the district court judge presumably examined the entire ticket. At least he had before him "all evidentiary facts" material to the issue of compliance with Article 3, and the parties did not dispute that the facts were complete (253 F. Supp. at 138). The parties had joined issue on the question and had submitted affidavits. The pertinent writing on the ticket was on the "outside front cover", on the "coupons", and "on page 4." Part was "virtually invisible . . . ineffectively positioned,

diminutively sized, and unemphasized by bold face type, contrasting color, or anything else" (253 F. Supp. at 243). These, of course, are basically factual matters depending "in each case on the particular factual circumstances . . . to be applied by the jury on the evidence before it." *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851, 857 (2d Cir. 1965), *cert. denied*, 382 U. S. 816. However, the district judge in *Lisi* thought a jury could not reasonably find differently than he did (253 F. Supp. at 239). A majority of the Court of Appeals agreed with him. The dissenting judge thought that even in this extreme case the court had usurped the jury's function (370 F. 2d at 515).

No matter who is right and who is wrong in *Lisi*, the case has nothing to do with our case. Here the parties did not join issue; they agreed instead that there was no issue. Here neither judge nor jury examined any part of the tickets other than the coupons, and they examined those simply to determine whether the flight was international. What was on the outside front cover, or on page 4, or on any other page, or on the back, was not before any fact-finder and is nowhere in evidence. What was said on any such parts of the ticket, let alone how it was said, i.e., its size, contrasting color, style of type, etc., is not, and never has been, a part of this case. What a fact-finder, judge or jury, would have said about the evidence had it been introduced, is conjectural.[9] One thing is of passing

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9. To have won on this issue plaintiff would have had to convince a jury (defendant did not waive jury trial on this issue) that Berguido's ticket was not delivered in time to give him reasonable notice of the Warsaw Convention so that he could take protective measures such as purchasing flight insurance. *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U. S. 816. Berguido got his ticket three days before his initial flight and eighteen days before the fatal flight (Complaint, ¶ 3, *supra* p. 9). He was a member of the Philadelphia Bar, specializing in international law, and he served on American Bar Association committees on international law (Trial Transcript, January 27, 1964, pp. 548-9, Record Document No. 184). He was counsel for the consulates of seventeen

interest. The type on the copies of the Berguido coupons is larger, more noticeable and easier to read (in spite of the obviously poor duplication) than its counterpart in *Lisi* (Compare Appendix B to Petition with the coupon replica at 253 F. Supp. 242). But these are factual matters, wholly inappropriate for this court to consider.

Since petitioner's Questions Presented Nos. 1, 2, 3 and 5 all depend upon facts not of record, and since petitioner's statement of the case does not contain "the facts material to consideration" of those questions [Rule 23(e)], or the record reference where the "evidence offered" may be found [Rule 40, 1(e) and 2], the petition should not be given consideration. To put this another way, petitioner's attempt to squeeze this case into the *Lisi* mold is an example of extreme advocacy. It is inappropriate for this court to be burdened with that sort of thing.

2. The Decision Below Does Not Conflict With Lisi or Any Other Case.

The Court of Appeals simply affirmed the judgment of $8,300 against the defendant, thereby confirming the correctness of verdicts reached independently by a jury and by a judge sitting non-jury. Contrary to what is said in the petition before this court (Pages 9, 10, 11, 12, 22, 26-7) Judge Forman and Chief Judge Biggs did not "hold" that if a plaintiff in a Warsaw Convention case proves noncompliance with Article 3, he must then prove negligence.

Central and South American countries (same transcript, p. 552), and he represented South American shippers (*idem* p. 556). In the last two years of his life he flew to South America about thirty times (*idem* p. 553). Before his ill-fated trip he purchased flight insurance (conceded by plaintiff's counsel at hearing prior to 1964 trial—Transcript of hearing before Chief Judge Clary, November 26, 1963, p. 7, Record Document No. 144). We doubt that even the forensic talents of Mr. Richter could have convinced a jury to return a verdict his way on those facts. The very contention that Berguido could not take protective measures is the sort of legal extremism which creates community disrsepect for the law and lawyers.

They (and five other judges on petition for rehearing) decided simply that Mr. Richter lost even if his own rather devious argument about the law were to be applied. If that is not clear to this court from Judge Forman's opinion alone, it should be plain in light of the case's history, the rules governing appeals in the Third Circuit, and the argument Mr. Richter presented there.

The Third Circuit applies the rule that issues not presented to the trial court will not be entertained on appeal. *In re Linda Coal and Supply Co.*, 255 F. 2d 653, 657 (3rd Cir. 1958); *Quinones v. Township of Upper Moreland*, 293 F. 2d 237, 240 (3rd Cir. 1961); *Cochran v. B. & O. Railroad Company*, 340 F. 2d 709, 710 (3rd Cir. 1965). The court also has a rule that it will not consider on appeal an issue not included in a party's "Statement of the Questions Involved". Rule 24(2)(b).[10] Finally, there is a well established pre-trial procedure in the Eastern District of Pennsylvania. The Court of Appeals, like the District Court, holds parties to the issues they have preserved at pre-trial. *Payne v. S. S. Nabob, et al.*, 302 F. 2d 803 (3rd Cir. 1962), *cert. denied*, 371 U. S. 870; *Kline v. S. M. Flickinger Co.*, 314 F. 2d 464 (3rd Cir. 1963); *Wiggins v. City of Philadelphia*, 331 F. 2d 521, 526 (3rd Cir. 1964); Fed. R. Civ. Proc. No. 16.

In this case the trial judge, George H. Boldt, held an extended pre-trial. He ordered, with the agreement of the parties, that the issues Judge Clary gave the 1961 jury were the issues to be tried, unless counsel specifically raised others (56a). Judge Clary had ruled that the Warsaw Convention governed the flight in question and that the sole questions for the jury (he submitted a special verdict) were (1) was there wilful misconduct, and (2) what were

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10. "The . . . requirements are to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved." 28 U. S. C. A. Rules, U. S. Courts of Appeals, p. 212.

plaintiff's total damages? (Record Document No. 116). At the pre-trial before Judge Boldt plaintiffs' counsel preserved one and only one further point, that the Warsaw Convention was inapplicable, as per their trial memorandum filed May 22, 1961 (117a). So the parties went to trial limited to the issues (1) did the Warsaw Convention apply, (2) if it did, was there wilful misconduct, and (3) if it did not, was there negligence?

Defendant proved that the flight was international, and the trial judge ruled that the Convention applied (A24). He also found neither wilful misconduct nor negligence (A27). Plaintiff appealed.

While the appeal was pending the Second Circuit decided *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (1965), *cert. denied*, 382 U. S. 816, and plaintiff's counsel in the instant case looked for a way to open the "issue" door. They could not argue that the holding in *Mertens* was applicable here, for they had not introduced evidence on the theory that Berguido had no chance, after delivery of a ticket, to take protective measures,[11] and they had not preserved the point at pre-trial. Under well-settled law that approach was unavailable to them. So they devised the unexpected, if not dishonest, argument that the pre-trial reservation meant that the Warsaw Convention *did not apply* if the air line failed to prove delivery of the ticket.[12] Judge Forman summarized the argument, perhaps with scepticism,[13] as follows (Petition, pp. 65-66):

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11. See footnote 8, *supra* p. 10. We doubt that plaintiff's trial lawyers would ever have put in issue, especially before a jury, Berguido's knowledge of the Convention limitation. Counsel could hardly want to open the door to proof that Berguido purchased flight insurance.

12. The fact that there was clear record evidence that the ticket was delivered did not keep appellant's counsel from making the argument.

13. See especially the judge's note that the District Court did not understand plaintiff's position to be what plaintiff's counsel told the Court of Appeals it was (Petition, p. 69, fn. 11).

> "Plaintiff alleges that it also urged that defendant had not met its obligations under Article 3(1) of the Convention and, thus, the Convention did not apply. Plaintiff appears to indicate that the District Court was thus urged in the alternative to try the case on the theory of simple negligence."

Plaintiff's complete STATEMENT OF QUESTIONS INVOLVED in the Court of Appeals was:

> "Did the lower court err when it:
>
> 1. ruled that the Warsaw Convention applied to this case?
>
> 2. found that jets were the probable cause of this accident and consequently ruled that the plaintiff did not sustain the burden of proving that the accident was caused by wilful misconduct?

Then, limited as they were by the pre-trial issues, and limited by the rules of the Court of Appeals to arguing the foregoing questions, appellant's counsel argued in their brief (p. 11):

> "The judge ruled as a matter of law that the Warsaw Convention applied (1252a) . . . The defendant never proved any delivery of this ticket to plaintiff's decedent and did not prove any affirmative consent to this statement on the ticket by the decedent. We shall show below that as a matter of law what the defendant proved was not sufficient to sustain its burden of proving that this case was governed by the Warsaw Convention. *Since the case was not governed by the Warsaw Convention, plaintiff merely had to prove negligence* and since such negligence was clearly proved, this Court should reverse and award damages as found by the trial judge . . ." (Emphasis supplied.)

On page 19 of the same brief again they argued:

> ". . . the Warsaw Convention clearly should not apply to the present case.[14]
>
> "If the Warsaw Convention does not apply to this case, there would be unlimited liability on the defendant for simple negligence."

After filing the foregoing brief plaintiff's counsel were given leave to file a supplemental brief in which "for the first time", as Judge Forman put it (Petition, p. 69),[15] they advanced the notion that the Warsaw Convention not only provides for liability (which, subject to an exception in the Convention itself, defendant does not dispute) but for *unlimited* liability (which is quite a different thing and which defendant does dispute).[16] Under counsel's unique "unlimited liability" view of the Convention a plaintiff has no burden to prove anything. A defendant, they said, must prove compliance with Article 3, and absent proof of

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14. This is part of a quote which is repeated verbatim in the Petition, p. 30, with an interesting variation. Now instead of the words "the Warsaw Convention should not apply" are the words "the limitations of Article 25 [sic] of the Warsaw Convention clearly should not be permitted to attach". Apparently petitioner no longer feels limited by the pre-trial order or the court rules which precluded that argument below.

15. It is not clear whether Judge Forman meant for the first time in history or for the first time in this case.

16. Much of the Petition is devoted to counsel's "unlimited liability" theory, which is simply an exercise in poor semantics. They take about twenty-seven pages to disguise their major premise that the Convention's words "shall be liable" (Article 17) mean "shall pay unlimited damages." The reasoning has a Lewis Carroll flavor: (1) the Convention creates liability, (2) "absolute" is a handy word to use along with liability, (3) "absolute" is the same as "unlimited", *ergo* (4) the Convention provides for absolute, unlimited liability. The Court of Appeals did not accept the syllogism, and could not, since the Convention provides expressly that liability (Article 17) "shall be limited" (Article 22) and that suit may be brought "only . . . subject to the . . . limits set out in this convention" (Article 24). Petitioner did not print Article 24.

such compliance the unlimited damage part of the Convention applies.[17]

Judge Forman's opinion disposed of the case on the *arguments* appellant's counsel presented. Notice how carefully the judge casts the issues in terms of appellant's "argument" (Petition, pp. 70-71). First he gives short shrift to the attempt to avoid ten years of litigation by resort to the absolute and *unlimited* "argument". His decision in this respect is consistent, as he points out it is, with earlier Warsaw Convention cases (Petition, pp. 70-71), and we would add that it is consistent with the most recent Warsaw case, *Lisi.* "Having disposed of this contention" (Petition, p. 71), i.e., the contention in appellant's supplemental brief, the judge resolves the only remaining "question involved" about the Convention, i.e., question No. 1 in the original brief (*supra* p. 16). He concludes that on the evidence the court must sustain Judge Boldt's finding of no negligence. Consequently the appellants lost, for even if their "argument" about non-applicability of the convention had entitled them to proceed to trial on a negligence theory, they had failed at trial to sustain their burden (Petition, pp. 71-74). Having reached this conclusion it was *unnecessary* for the court to resolve differences between the parties about the meaning of the pre-trial order, the extent or lack of proof about Berguido's ticket, where the burden of proof lies under the Convention, or the significance of the earlier reversal of the jury verdict for $8,300 (Petition, p. 70).

This case was decided—and in view of Mr. Richter's switch of theory after years of litigating other issues—

17. Where counsel find a provision for unlimited damages either in the language or history of the Convention, or in any of the cases they cite (Petition, pp. 11, 12, 21, 24-5, 26-7), is a mystery. If they are right, all the courts which for all these years have required proof of wilful misconduct as an *exception* to the Convention's scheme of *limited* liability have been wrong. The "no ticket" *exception* to limited liability set out in Article 3(2), sentence 2 (Petition, p. 4) is phrased exactly as is the "wilful misconduct" *exception* in Article 25(1) (Petition, p 7).

justly decided on narrow grounds. There is no case remotely like it. Therefore it conflicts with no case. More specifically the case was resolved on grounds entirely foreign to the *Lisi* litigation. Seven judges, all of whom were supplied the full text of the *Lisi* opinion well before they decided the petition for rehearing, saw no conflict between Judge Forman's opinion and the Second Circuit's opinion in *Lisi*. Surely a rehearing would have been held if they had decided that their holding conflicted with the Second Circuit's.

3. This Court Should Not Grant Certiorari to Find Facts.

Pages 34 through 49 of the petition are devoted to an argumentative re-hash, in the light most favorable to the plaintiff, of the record of some of the evidence in the most recent trial (eight trial days, 59 exhibits). Petitioner argues that the trial judge was wrong when he found that all the evidence did not add up the way petitioner wishes it did. Presumably Chief Judge Biggs and Judge Forman were, in petitioner's view, also wrong when they decided that the trial judge justifiably (defendant would argue "necessarily") found as he did. Respondent most emphatically disagrees with petitioner's analysis of the evidence. But seeing nothing in this court's Rule 19 to indicate that the court would grant certiorari to resolve differences over the correctness of a trial judge's findings of fact, we resist the temptation to re-argue the evidence here.[18]

4. To Grant Review Would Be Futile.

Review of the decision of the Court of Appeals will do petitioner no good in the long run. There are multiple,

18. Defendant's argument to the trial judge is in the Appendix, 1163a-1211a. The trial judge found that plaintiff's key witnesses were neither expert nor truthful (A28-29). These are the men whose qualifications and opinions petitioner asks this court to accept, calling them, contrary to the record below, "three highly qualified aeronautical experts" (Petition, pp. 35, 39, 48).

as yet undecided grounds on any one of which the judgment of $8,300 would have to be affirmed (Petition, p. 70). Not the least of these stems from a jury verdict for $8,300 in 1964. The trial judge set it aside on grounds which twice in recent years this court has held to be insufficient to justify reversal. Chief Judge Clary's opinion is printed in Appellee's Appendix, 44b-64b. Add to what the judge says about admitting evidence "over plaintiff's objections" (45b) the fact that the ground for the objection was not the ground for the reversal, and add the fact—for it is a fact—that no proper record was made during the course of the three week's trial to preserve for review the other "objectionable" matters the judge discusses at such length, and compare the end result with this court's holdings in *Gibson v. Lockheed Aircraft Service, Inc.*, 350 U. S. 356 (1956) and *Mercer v. Theriot*, 377 U. S. 152 (1964). Furthermore, the grant of the new trial violated Amendment 7 of the Constitution since the judge "reexamined" the jury's decision otherwise "than according to the rules of the common law."

It would unduly prolong this brief to argue in detail any of the many points which, if certiorari were granted, would in the last analysis require affirmance of the judgment. We merely list them to preserve our right to press any or all should it become necessary.

1. Plaintiff had a fair trial in 1964. The jury's verdict was therefore final.

2. Plaintiff's pre-trial agreement that the Berguido ticket complied with Article 3 of the Convention precludes an argument to the contrary on appeal.

3. The District Court for the Eastern District of Pennsylvania limits issues at trial to those stated in parties' pre-trial memoranda. Plaintiff did not include the "ticket issue" in his memorandum or in any amend-

ment. It is, therefore, before no court, trial or appellate.

4. The pre-trial order, which with agreement of the parties, narrowed the issues to (a) wilful misconduct and (b) applicability of the Convention to Berguido's flight, precludes expanding the issues on appeal, since Rule 16, Fed. R. Civ. Proc. provides that ". . . such order . . . controls the subsequent course of the action . . ."

5. Plaintiff's failure to raise the "ticket issue" in the trial court precludes arguing it on appeal.

6. Since defendant waived jury trial after, and only after, the issues were narrowed to exclude the "ticket issue," consideration of that issue at the appellate level would be a deprivation of defendant's Constitutional right to trial by jury.

7. Under federal procedure, contrary to the decision of the Court of Appeals, parties may, after issues are narrowed at a pre-trial conference, agree to waive findings of fact and conclusions of law and to accept a general finding in the nature of a verdict. Accordingly, Judge Boldt's general finding that the Convention applied included the sub-finding that the ticket complied with Article 3.

8. Plaintiff failed to sustain the burden of establishing, in order to remove the liability limitation of the Warsaw Convention, that Berguido's ticket was not delivered in accordance with Article 3.

9. Extension of the *Mertens* (*supra* p. 12, fn. 9) and *Lisi* (*supra* pp. 11-12) cases to impose on carriers other than the issuing carrier liability for "irregularity of the passenger ticket" would be contrary to the explicit provisions of the Convention (Article 3, Petition, p. 4).

CONCLUSION.

Much time and effort has been devoted to this case by everyone involved, parties, witnesses, lawyers and judges. Two things have emerged quite clearly: (1) on all the evidence misconduct of Eastern's crew is not the explanation of this unfortunate crash, and (2) where trial procedures conform to the rule of law, our system of trial —with or without a jury—is quite capable of distinguishing between fact and fantasy. Twice now the fact finder has decided there was no wilful misconduct. Twice now, limited only by what is legally permissible, plaintiffs have received every opportunity to prove their case as fully as they saw fit. The Court of Appeals saw that clearly. They decided the appeal on meticulously correct and just grounds, fully within the exercise of their own discretion in the supervision of their own bench and bar. The decision is of local concern only, and there is no reason for this court to review it. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE TRIAL JUDGE, GEORGE H. BOLDT.

The Court: Good afternoon, gentlemen.

We are convened now for pronouncement of judgment.

In the hours of decision every judge worthy of the name and position is alone with his conscience and aided only by such character qualifications and abilities as God has given him. In every difficult case involving serious issues decision is a strenuous and exhausting process.

Evidence as to important facts in controversy often is not available or not presented to the Court. Of course, only the evidence presented to the Court must be the sole basis of decision. The search for truth on meager and incomplete evidence is a most difficult task. So it has been in the present instance.

By stipulation the making and entry of findings of fact and conclusions of law pursuant to Civil Rule 52 has been waived, and counsel have agreed expressly that the Court's decision may be limited to general findings, either for or against liability, and in a single total sum fixing damages, including all elements for which damages may be allowed. The case will now be determined on that basis.

However, before making such general findings, it appears appropriate and desirable to state certain basic holdings as to the applicable law and to make several particular findings of fact.

The evidence presents a large number and variety of what might be called incidental, preliminary or secondary fact issues. Discussion of any considerable number of them would require very lengthy statement and serve no useful purpose. Suffice it to say that the evidence relating to every

fact issue has been painstakingly examined for credibility, weight and significance. The determination so made in my humble judgment fully supports the particular and general findings of the Court.

Various comments and statements made by me during the trial and particularly during the final argument of counsel have already indicated my reasoning and views on a number of fact and law questions.

I have not seen or reviewed a transcript of the argument. Indeed, I am not sure there is one. But I hereby reaffirm the observations and findings stated therein.

It should be stated for the record that every exhibit has been examined closely. Every deposition and transcript of prior testimony in the present record has been carefully read. Many portions of the daily transcript of this trial have been painstakingly reviewed, and the argument of counsel has been heard with close attention and full consideration in the process of reaching decision.

In my deliberations no part of the proof offered by plaintiff has been treated as inadmissible evidence. Before reaching final findings and conclusions as to liability, all evidence offered by plaintiff, whether or not objected to, has been weighed and considered for probative value. Also, those portions of the defendant's evidence to which plaintiff objected have been carefully screened. No portion thereof found incredible or even doubtful as to admissibility has directly or indirectly entered into the Court's ultimate decision.

Defendant's Request for Admission of Facts, Defendant's Exhibit 12, quoted at Pages 904-6 of the transcript of this trial were not answered by plaintiff, and therefore the stated therein must be accepted as uncontroverted. Those facts fall squarely within the term "international flight" as defined in the Warsaw Convention, 49 United States Statutes, Page 3,000. Accordingly, that international treaty is controlling in this action.

It is not for this Court to question the policy or wisdom of the treaty or to evade or avoid the plain meaning of its language.

Under the treaty defendant's liability is limited to the amount defendant has tendered to the plaintiff in the present case, namely, $8300, unless the accident was caused in whole or in part by willful misconduct of defendant or any of its employees or agents. Thus, whether or not defendant is chargeable with any act or omission constituting final misconduct is the basic and ultimate issue for decision as to liability.

Plaintiff cites KLM v. Tuller, 292 F. 2d 775, an action based on the Warsaw Convention, and relies on the definition of wilful misconduct stated therein as follows:

> "'. . . the intentional performance of an act with knowledge that the * * * act will probably result in injury or damage, or * * * in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means * * * failure to act' in such circumstances."

This definition is substantially identical with that given to the jury in the two previous jury trials of this case.

As so defined, plaintiff has the burden of proof to show by a preponderance of evidence, willful misconduct chargeable to defendant.

In considering whether that burden has been sustained, this Court has meticulously followed the principles stated in the following quotations from Smith v. Bell Telephone, 397 Pa. 134, and Lear v. Shirk's Motor Express Corporation, 397 Pa. 144:

> "The formula that the 'circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances' is not a correct statement of the rule to be applied. . . .

"Therefore, when a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducted therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith."

And from the Lear case:

"It is enough that he" (plaintiff) "produces evidence which may properly be found by the jury to justify an inference that the defendant's negligence was the proximate cause of the accident because such evidence outweighs even though it does not exclude an inference that the defendant was not negligent or that his negligence was not the proximate cause of the accident."

The only evidence upon which plaintiff bases its contention of willful misconduct on the part of the defendant pertains to, first, certain health conditions of the pilot and co-pilot of Eastern Air Lines flight 642, and, second, knowing and intentional violation by the flight crew of regulation prescribed for an ILS approach to the Jacksonville airport, particularly with respect of mandatory minimum elevation. Every minute item in the record purporting to bear directly or indirectly upon the cause of the crash has been examined and reexamined in considering the direct evidence and the reasonable inferences to be drawn therefrom.

A considerable number and variety of causes of the accident under the evidence are within the realm of possibility, as distinguished from probability. As stated in the Smith and Lear decisions just quoted, the judgment of the Court must be determined upon the probabilities insofar as they are disclosed or can be determined from the

evidence, and not on mere possibilities whether or not mentioned in the evidence.

Viewed strictly in this light, I have reached the following firm findings and conclusions:

1. I find there is not a preponderance of credible evidence that a health condition of either pilot or misrepresentation, if any, relating thereto, constituted willful misconduct causing or contributing to the crash of Flight 642.

2. It is my opinion, and I now so find, there is not a preponderance of credible evidence showing a substantial or reasonable probability that the Flight 642 crew, or any of them, under other than emergency conditions knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach.

3. In my opinion there is substantial and reasonable probability shown by a preponderance of the evidence that the presence of jet aircraft in or near the ILS glide slope for Runway 5 and in or near the immediate pathway of the landing approach of Flight 642 threatened or interfered with the approach of Flight 642, bringing about emergency conditions and accident resulting in the crash without willful misconduct, negligence or fault on the part of defendant or any member of the crew of Flight 642.

4. The actual cause of the crash of Flight 642 cannot be determined on the record before me, and I find willful misconduct as a cause of the accident to be no more than one possibility, among others.

In any event, willful misconduct, in my judgment, is far less probable as a cause of the crash than the highly probable presence and actions of jet aircraft in or near the ILS approach path of Flight 642.

As just stated, I believe there is substantial probability that one or more jet aircraft were in or near the immediate vicinity of the ILS glide slope leading to Runway 5 during the landing approach of Flight 642 within a very short period of time prior to the plane crash. Three witnesses emphatically testified to that effect: Wheeler, Lubin and Farrish. To me their testimony has the ring of truth, and I find no reason to doubt their credibility on the essential fact as to the presence of jet aircraft as stated in their testimony.

To me, affirmative testimony as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive and convincing than testimony that said sights or sounds were not seen or heard by other witnesses having opportunity and occasion to see and hear.

On this subject, the negative testimony in this case, whether taken singly or as a whole, in my mind does not balance or outweigh the affirmative testimony. The testimony of Greenslade and others to the effect that no military jets were reported or recorded as operating in the Jacksonville area at the time, while given full consideration, does not convince me that jet aircraft were not or could not have seen and heard at the time and place indicated in the testimony of Wheeler, Lubin and Farrish.

Inasmuch as plaintiffs' contentions as to liability rest heavily upon the testimony of witnesses offered as experts, particularly Glickstein, Kapner and Cann, I should briefly state my findings and observations concerning those witnesses, as well as my appraisal of the credibility of Watson and Schmidt offered by defendant as experts in some or all of the areas of Inquiry covered by Glickstein, Kepner and Cann.

Plaintiffs' basic contention that the pilot of Flight 642 attempted a so-called take-a-look or sneak-in approach by knowingly and intentionally piloting their plane to a posi-

tion below the authorized ILS approach minimum elevation was devised by Mr. Glickstein, according to his testimony. At a time not clearly identified in the record but considerably after the accident and after the initial proceedings in this action, Glickstein actively participated in the case as an attorney in the taking of depositions, at least two of which, those of Farrish and Lubin, are now in evidence.

From these circumstances, and many others in the record, it is clear to me that Mr. Glickstein to a considerable extent has been a partisan in this litigation. His appearance, demeanor and manner of testifying on the stand, as well as the content of his testimony, in my judgment, shows him lacking the distinterest and objectivity which reasonably ought to characterize a reliable and credible expert. I make generous allowance for the fact that many, if not most, experts tend to be more or less partisan. In my opinion, Mr. Glickstein substantially exceeds the allowable limits in this particular. He readily expresses unqualified opinions which in my view are highly speculative and conjectural. While long and well qualified as an airplane pilot, Mr. Glickstein has little, if any, expertise in the investigation of airplane accidents or in the scientific analysis of the cause of airplane crashes. In important particulars the assumed facts on which his opinions purportedly were based do not lead me to the conclusions he derives therefrom.

Incidentally, I do not find as proven by a preponderance of the evidence all of the assumed facts stated in the hypothetical questions put to Kepner, Glickstein and Cann. But even if all assumed facts be taken as proven, I do not agree with the opinions derived therefrom by these witnesses. The end result just stated is applicable to Kepner, the long-time friend of Glickstein, and Cann. From my observation of these gentlemen on the stand and in an analysis of their testimony I find their opinions incredible,

to me, and unacceptable in various important and decisive particulars.

During the argument my appraisal of the credibility of Watson and the acceptability of his testimony was stated.

I now state my finding that Schmidt is a highly credible witness, and I find no reason to doubt the validity of the opinions that he has expressed. His impressive professional background and experience in airplane accident investigation and analysis of the cause of airplane accidents is unchallenged. It appeared to me that Mr. Schmidt was meticulously accurate and truthful in his testimony.

For the reasons stated, and many others of greater or lesser importance in the reaching of my final decision, I now make the ultimate general finding on liability as follows:

Plaintiff is entitled to recover against defendant only as limited by the Warsaw Convention in the amount of $8,300, the sum previously tendered to plaintiff by defendant. The Clerk is directed to enter judgment to that effect forthwith, with recovery of costs by defendant.

I now make the additional general finding that plaintiff sustained damage by reason of the death of her husband, Carlos Berguido, on account of all the allowable elements of recovery, in the total sum of $375,000, for which, of course, recovery is not allowed.

This is the judgment of the Court, and it is so ordered.

We will recess, subject to call.

APPENDIX B.

PERTINENT PROVISIONS OF THE WARSAW CONVENTION NOT PRINTED BY PETITIONER.

CHAPTER I. SCOPE—DEFINITIONS.

ARTICLE 1.

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its

international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

* * *

CHAPTER II. TRANSPORTATION DOCUMENTS.

* * *

SECTION III.—AIR WAYBILL.

ARTICLE 5.

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

* * *

ARTICLE 8.

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

ARTICLE 9.

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

ARTICLE 10.

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

* * *

CHAPTER III. LIABILITY OF THE CARRIER.

* * *

ARTICLE 24.

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

* * *

ARTICLE 26.

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from

the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

* * *

ARTICLE 28.

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

ARTICLE 29.

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

ARTICLE 30.

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be

subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

* * *

CHAPTER V. GENERAL AND FINAL PROVISIONS.

ARTICLE 32.

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

ARTICLE 33.

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

* * *

ARTICLE 36.

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

* * *

ARTICLE 38.

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

ARTICLE 39.

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

* * *

ARTICLE 41.

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

* * *